No. 83-1240
No. 83-1065

IN THE

Supreme Court of the United States

October Term, 1983

THE STATE OF NEW YORK,

Petitioner,

against

THE ONEIDA INDIAN NATION OF NEW YORK STATE, a/k/a THE ONEIDA NATION OF NEW YORK, a/k/a THE ONEIDA INDIANS OF NEW YORK; THE ONEIDA INDIAN NATION OF WISCONSIN, a/k/a THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.; and THE ONEIDA OF THE THAMES BAND COUNCIL; and THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Respondents.

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Petitioners,

against

THE ONEIDA INDIAN NATION OF NEW YORK STATE, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief for the State of New York, Petitioner in No. 83-1240

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Dated: June, 1984

Questions Presented.

1. Whether an Indian Tribe enjoys a private right of action under the federal common law or pursuant to the Trade and Intercourse Act of 1793 to recover damages for the use and occupation of lands allegedly obtained from said Indian Tribe in violation of the Trade and Intercourse Act of 1793.

2. Whether, in any event, the courts should have declined to entertain this action because the "political question" doctrine is directly applicable to this case.

3. Whether the applicable statute of limitations is a bar to the present action, which was commenced 175 years after the cause of action accrued.

4. Whether the 1795 conveyance by the Oneida Indians to the State of New York was subsequently ratified by the United States and is therefore valid and enforceable.

5. Whether, since the federal courts would lack jurisdiction over the State in an original action brought against the State by the Counties because of the State's sovereign immunity, the courts also lack ancillary jurisdiction over the same issues.

6. Whether a State by negotiating treaties with an Indian Tribe in alleged violation of the Trade and Intercourse Act of 1793 may be held to have waived impliedly its immunity to suit in federal court by non-Indian claimants, the only claimants against the State involved here.

7. Whether, assuming the existence of federal jurisdiction to hear the Counties' claims, substantive New York law would permit the imposition of an award against the State in an amount other than that specifically provided by the New York law of real property.

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Opinions Below.

The opinion of the United States Court of Appeals for the Second Circuit is reported at 719 F2d 525 (2d Cir, 1983) and is reprinted at pages 207a-258a of the Joint Appendix ("JA 207a-258a"). Three decisions were rendered by the District Court for the Northern District of New York (Edmund, Port, D.J.), dated respectively July 12, 1977, October 5, 1981 and May 5, 1982. The decision and order dated July 12, 1977 is reported at 434 F Supp 527 (NDNY, 1977) and is reprinted at JA 45a-86a. The unreported decision dated October 5, 1981 is set forth at JA 154a-175a. The unreported decision dated May 5, 1982, which was dictated from the bench, is set forth at JA 188a-199a.

Jurisdiction.

The opinion of the United States Court of Appeals was filed on September 29, 1983. By order filed March 19, 1984, this Court granted New York's petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, and consolidated the case with case no. 83-1065, *County of Oneida, New York, et al. v. Oneida Indian Nation of New York State, etc., et al.* This Court's jurisdiction to review the case rests upon 28 USC § 1254(1).

Constitutional and Statutory Provisions Involved.

United States Constitution, Article I, section 8; Article III; The Tenth Amendment; The Eleventh Amendment; and the Trade and Intercourse Act of 1793 are set forth in pertinent part in the appendix to this brief.

Statement of the Case.

This action was commenced in February, 1970, by the Oneida Indian Nation of New York State and the Oneida Indian Nation of Wisconsin ("Oneida Indians") against the County of Oneida, New York and the County of Madison, New York (JA 4a-10a).* The action, which was specifically brought as a "test case", seeks damages for the use and occupation of approximately 872 acres of land during the years 1968 and 1969 which lands were secured through a chain of title commencing with patents issued by the State of New York. In that action, it was contended that the State of New York did not have title and could not transfer the lands because it had obtained the lands by treaty with the Oneida Indians in 1795 (JA 31a-35a) which was allegedly in violation of the Trade and Intercourse Act of 1793 (3a).**

In an unpublished opinion rendered on November 11, 1971, the District Court dismissed the claim for lack of federal question jurisdiction. The Court of Appeals affirmed, 464 F2d 916 (2d Cir, 1972), and this Court, in an opinion reported at 414 US 661 (1974) reversed and remanded, holding that, "for jurisdictional purposes", 414

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*The Oneida Indian Nation of New York State and the Oneida Indian Nation of Wisconsin are separate entities, the former allegedly having a situs in the Counties of Oneida and Madison, New York, and the latter in the State of Wisconsin. The third plaintiff, the Oneida of the Thames Band Council, was permitted to intervene during the liability phase of the action; it has as its situs Ontario, Canada.

**The significance of this litigation can be placed somewhat in perspective when it is borne in mind that by the 1795 Treaty the Oneidas transferred to the State of New York approximately 100,000 acres of land. Hence, even beyond its precedential effect, the direct consequences of this action are far vaster than its immediate holding would indicate.

US at 675, the complaint sufficiently stated a controversy arising under the Constitution, laws, or treaties of the United States. The Court did not rule on the issue of whether substantive federal law in fact provided the Oneidas with a right of action.

Following remand, the Counties filed third-party complaints against the State of New York seeking judgment against the State for any amounts recovered against them by the original plaintiffs (JA 18a-20a, 21a-22a). The case was then trifurcated by the District Court.

By decision and order dated July 12, 1977 (JA 45a-86a), the District Court ruled that the Counties were liable to the plaintiffs for wrongful possession of the plaintiffs' land.* On October 5, 1981, following a trial on the issues of damages, the District Court entered a judgment against the Counties in favor of the plaintiffs in the following sums (JA 178a):

Against Madison County	$9,060.00, plus interest
Against Oneida County	$7,634.00, plus interest

*In ruling on the issue of liability, the District Court acknowledged at outset that the reach of the Oneidas' claim fell "far beyond the boundaries of the present suit" (JA 47a), and noted that the "potential for disruption in the real estate market is obvious and is already being felt" (JA 48a). In view of the fact that the court's decision, and the judgment of affirmance by the Court of Appeals, implicitly holds that thousands of individuals and entities within the area of the Oneidas' claim are now trespassers, these are truly understatements. As was noted by the Court of Appeals in its affirmance (JA 213a), between the years 1795 and 1846, the Oneidas entered into 25 additional treaties with the State of New York, only two of which "were made with federal supervision and approval". Indeed, the catastrophic nature of the ruling below was highlighted by the Court of Appeals when it observed in a footnote *(id.)* that one authority has "estimated that the 'State of New York acquired from the Indians all the western one-half of that state by nearly 200 treaties not participated in by the United States Government' ". Quoting from F. Cohen, *Handbook of Federal Indian Law,* p 420, n 24 (1945 ed).

The State of New York moved for an order pursuant to Rule 12(b)(1)(2)(6) of the Federal Rules of Civil Procedure dismissing the third-party complaints for (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, and (3) failure to state a claim upon which relief can be granted (JA 182a-183a). The Counties cross-moved for summary judgment (JA 184a-187a).

By decision and order dated May 5, 1982, the District Court denied the State's motion and granted the Counties' motion (JA 188a-201a). A final judgment in favor of the Counties and against the State was entered on May 19, 1982 (JA 202a-203a).

All three parties appealed to the United States Court of Appeals for the Second Circuit. On September 29, 1983, the Court of Appeals, over a strong dissent by Circuit Judge Meskill, affirmed both the judgment of the District Court holding the Counties liable for illegal occupation of the plaintiffs' land and its judgment that the State of New York must indemnify the Counties for any damages assessed against them (JA 248a). The matter was remanded for further proceedings relating to the issue of damages.

In ruling as it did, the Court of Appeals held, *inter alia,* that at the time of the 1795 purchase of their land by the State of New York, the Oneida Indians enjoyed a federal common law right of action for occupancy and use of their lands and that such common law right of action had not been preempted by the Trade and Intercourse Act of 1793 (JA 215a-219a). The court held additionally that the District Court possessed ancillary jurisdiction over the Counties' third-party claims against the State (JA 243a-244a);

that the State, in purchasing the Oneidas' land, had impliedly waived its Eleventh Amendment immunity to suit (JA 245a-248a); and that under New York law, the Counties were entitled to be indemnified by the State for any damages assessed against them (JA 244a-245a). In a dissenting opinion (JA 248a-258a), Circuit Judge Meskill stated that he would reverse and remand with directions to dismiss the complaint upon the ground that an Indian Tribe does not possess a private cause of action to recover damages for wrongful possession under either the Trade and Intercourse Act or pursuant to federal common law.*

Summary of Argument.

I. The conclusion reached by the Court of Appeals that the plaintiffs, in 1795, possessed a federal common law right of action to recover damages for wrongful occupancy and use of their lands is not supported by the case law and no such right of action should be inferred. Even if such a right of action existed prior to 1793, it was preempted by the Trade and Intercourse Act, which comhensively addressed the issue of trade and intercourse with the Indians, and which, from 1793 onward, enunciated in detail both the conduct which was proscribed and a mechanism for the law's enforcement. Moreover, nothing is contained in either the language of the Trade and Intercourse Act of 1793, or in its legislative history, which supports in the slightest the proposition that in enacting the Trade and Intercourse Act, the Congress intended the Indian tribes to have a private right of action based upon its violation.

*In his dissent, Judge Meskill pointed to the "potentially staggering claims" which the majority's decision could engender (JA 248a), and observed that the problem was essentially a political one, requiring "a comprehensive solution that the judiciary cannot provide in one sitting" (JA 249a).

II. The Constitution of the United States commits to the Congress responsibility for the regulation of commerce with the Indian tribes. However, insofar as the instant controversy is concerned, Congress, through the Trade and Intercourse Act of 1793 and the Treaty with Six Nations (Treaty of Canandaigua), 7 Stat 44 (November 11, 1794), has explicitly delegated remedial discretion to the President. This militates strongly against the implication of a private right of action in favor of the Indians. It follows further that if any remedy is to be afforded the Oneidas for the alleged wrongful use and occupation of the subject lands by the Counties, such remedy cannot properly be fashioned by the courts unless it is at the behest of the President. The record in this case demonstrates that twice prior to the commencement of this action, the plaintiffs petitioned the President seeking the assistance of the United States in the prosecution of a claim against the State of New York. In the face of the President's decision not to prosecute such a claim, the courts below should properly have refused to entertain this lawsuit, implicating as it does a policy determination of a kind clearly not within the discretionary powers of a court to make and a political decision which has, in fact, already been made. Furthermore, if the lower courts' resolution of this matter did not actually express a lack of the respect due the political branches of government, it leaves open the possibility, should the Oneidas again petition the President, of embarrassment from various pronouncements by several departments on a single question. Additionally, in view of the chaos which would result from any judgment not wholly adverse to the plaintiffs, the application of the political question doctrine is fully warranted in this case.

III. Because there exists no federal limitations period which is expressly applicable to suits by Indian tribes to

recover damages for the wrongful use and occupation of their lands, the courts below should appropriately have applied the most analogous New York State statute of limitations in determining the timeliness of the Oneidas' action which was commenced 175 years after the cause of action accrued. Applying New York State's statute of limitation in this case would be neither inconsistent with the Trade and Intercourse Act, nor anomalous, but would be fully consonant with federal law.

IV. The United States may, by its subsequent actions, ratify, and thereby validate, transfers of land by Indian tribes which could otherwise be voided because of the Trade and Intercourse Acts. The language employed in the Treaties entered into by the Oneida Indian Nation and the State of New York on June 1, 1798 and June 4, 1802, both of which were conducted under federal supervision, demonstrate both an awareness and an approbation on the part of the United States of the 1795 transaction whereby the State of New York acquired the lands which are the subject of this action. The language contained in those Treaties constitutes a plain and unambiguous expression of federal ratification.

V. In ruling that the District Court possessed ancillary jurisdiction over the Counties' third-party claims against the State, the Court of Appeals committed error in disregarding the constitutional impediment to the Counties' actions—the State's sovereign immunity. The cases relied upon by the Court of Appeals are inapposite since none of them deal with a State as a third-party defendant. Neither the convenience of the litigants nor considerations of judicial economy can serve to override the Constitution; neither should suffice to permit a suit against a non-consenting State where the State has not waived its

sovereign immunity and where no independent basis for jurisdiction exists. Even if it were assumed that the State's acts in dealing with the Oneidas would constitute a waiver of immunity insofar as the Oneidas are concerned, such a waiver should not be extended to the Counties' dealings with the State. The Counties' actions are actions for money damages as indemnity resulting from an alleged breach of implied warranties. The only forum where such an action may properly be brought is in the New York State Court of Claims.

VI. Although a sovereign's immunity may be waived, the mere fact that New York may have entered into a federally regulated sphere of activity in dealing with the Oneidas is insufficient to constitute a waiver of the State's sovereign immunity. And, there is especially no basis for implying a waiver with respect to the State's dealing with non-Indian third parties, the only type of parties suing the State here. The ultimate question before a court looking at an alleged implied waiver of the Tenth or Eleventh Amendments is whether Congress intended to require that waiver. Insofar as the Trade and Intercourse Acts are concerned, there is no evidence of a congressional intent to create a private right to sue a state in the federal courts. The acts of New York in securing possession of the subject lands were acts of a sovereign nature, and the State was not engaging in private enterprise. Moreover, the fact that the Trade and Intercourse Act gave remedial authority to the President, militates strongly against a remedy of waiver by the State. This is especially so here since the claimed waiver in this case relates not to suits by Indians, but solely to the cross-claims of the Counties.

VII. Because the Counties' actions against New York are essentially an attempt to imply a warranty of title for

the conveyance of real property by the State, the courts below should have looked to New York's law of real property in fashioning a remedy. The Counties' claims against the State are, at bottom, contract claims, and thus depend for their vitality on the demonstration of a contractual relationship to indemnify for failure of title either by express or implied covenant. However, since it is not alleged that the patents by which New York conveyed the subject lands contained any covenants, and since New York law does not recognize an implied warranty of title for real property, the only remedy available to the Counties is that provided for by section 6 of the New York State Public Lands Law, which was enacted specifically for this purpose.

ARGUMENT.

POINT I.

The Court of Appeals erred in holding that the counties were liable to the Oneidas.

A. The Oneidas do not have a cause of action against the Counties under federal law.

The conclusion reached by the Court of Appeals that the plaintiffs may maintain this direct action for damages against the current occupiers of the lands which are the subject of this lawsuit is premised upon two somewhat interdependent propositions. The court reasons first that the Oneidas, in 1795, possessed a federal common law right of action to recover damages for wrongful occupancy and use of their land which right of action was not preempted by the Trade and Intercourse Act of 1793 (JA 215a-219a).

Second, the court concludes that the Congress, in enacting the Trade and Intercourse Acts, had intended the Indians to have an implied private right of action to enforce its provisions (JA 219a-231a). We submit that the Court of Appeals is in error in both respects and that there should consequently be a reversal.

1. An Indian Tribe does not possess a private right of action under federal common law.

There can be no question but that, from the outset, the relationship between the United States and the indigenous Indian populations living within the boundaries of the nation has been one of guardian and ward. See, e.g., *United States v Sandoval,* 231 US 28, 46 (1913); *Cherokee Nation v Georgia,* 30 US (5 Pet) 1, 17 (1831). It follows from this special relationship, and it has long been the law, that Indian tribes may be held subject to liabilities under the federal law only where Congress has explicitly so provided. See, *United States v United States Fidelity & Guaranty Co.,* 309 US 506 (1940); cf. *United States v Kagama,* 118 US 375 (1886). It should likewise follow, and it appears to be equally well settled, that any federal rights which an Indian tribe possesses must derive from specific congressional authority as well. This point was made by the Court of Claims in *Jeager v United States,* 27 Ct Cl 278, 285 (1892):

> "The civil rights incident to States and individuals as recognized by what may be called the 'law of the land' have not been accorded either to Indian nations, tribes, or Indians. Whenever they have asserted a legal capacity in the maintenance of their rights, it has been in pursuance of some statute of the United States specially conferring upon them

> the civil rights of suitors. In all cases in this court in which the interest of an Indian tribe has been the subject of litigation the proceeding has been under special statute conferring the right upon the claimant to bring a suit. The ordinary jurisdiction as to persons has never been sought to enforce against the United States the fulfillment of their obligations or the discharge of their duties".

Since, in regard to damage actions for wrongful possession, Congressional authority is completely absent, no right of action should be inferred.

The Court of Appeals cites as authority for the proposition that an Indian tribe possesses a common law right of action for wrongful possession the cases of *Johnson v McIntosh,* 21 US (8 Wheat) 543 (1823), and *Marsh v Brooks,* 49 US (8 How) 223 (1850). However, these cases are inapposite. *Johnson v McIntosh, supra,* was a diversity action and involved a title dispute between non-Indians, the plaintiff claiming title to certain lands situated in the State and district of Illinois under a purchase and conveyance from the Piankeshaw Indians and the defendant claiming under a grant from the United States. *Marsh v Brooks, supra,* was a *state* law proceeding in the nature of an ejectment to recover certain lands situated on the right bank of the Mississippi River. Although the Court observed in *Marsh* that the right to maintain an action of ejectment "on an Indian right to occupancy and use [was] not open to question", 49 US at 232, citing to *Johnson v McIntosh, supra,* in *Marsh,* as in *Johnson v McIntosh,* the parties to the dispute were again non-Indians. Thus, while it may be conceded that the early common law recognized a right of action based upon Indian title, this is a far different thing from asserting, as does the court below, that such right of

action lay with the Indians. As was stated by Chief Justice Marshall in *Cherokee Nation v Georgia, supra,* 30 US (5 Pet) at p 18:

> "At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of a right or a redress of a wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the constitution of the United States, *and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the Union.* * * *" (Emphasis supplied.)*

Even assuming that a Federal common law cause of action in favor of the Indians existed prior to 1793, such cause of action was preempted by the Trade and Intercourse Act of 1793.

It is settled law that when Congress directly and comprehensively addresses a question previously governed by federal common law, the common law is preempted. *Milwaukee v Illinois,* 451 US 304 (1981); *Middlesex County Sewerage Auth. v National Sea Clammers Assn.,* 453 US 1

**Creek Nation v United States,* 318 US 629 (1943), where this Court observed in dictum that Indian tribes had, in addition to a statutory right to sue, "a general legal right * * * to bring actions on their own behalf", 318 US at 640, does not lead to a contrary result. Aside from the fact that the statement relates to a later time frame, there is, we submit, a vast difference between asserting that an Indian tribe "may bring an action" and asserting that such tribe enjoyed the right to bring a federal common law action for wrongful possession in the federal courts, and that such right of action, if it existed at all, survived the passage of the Trade and Intercourse Acts. And compare *Creek Nation v United States, supra,* with *Felix v Patrick,* 145 US 317 (1892).

(1981). The Court of Appeals, while acknowledging this to be the law, nevertheless concluded that the Trade and Intercourse Acts did not preempt any common law right of action possessed by the Indians because (JA 218a):

> "[t]he Trade and Intercourse Acts were not comprehensive statutes. They did not speak directly to the question of the Indians' ability to enforce their possessory rights by an action in ejectment. * * * There is no evidence to suggest that Congress intended to deny common law remedies to the Indians.* * *"

That the Trade and Intercourse Acts did not "speak directly to the question of the Indians' ability to enforce their possessory rights by an action in ejectment", however, does not support the court's conclusion that the Act was not preemptive or that the Congress did not intend to deny common law remedies to the Indians. Whatever might have been the case prior to the passage of the Trade and Intercourse Act of 1793, thereafter a comprehensive pronouncement* dealing fully with the broad issue of trade and intercourse with the Indians and enunciating in detail both the conduct which was proscribed

*The Trade and Intercourse Act of 1793 is at least as comprehensive as certain other enactments found by this Court to be preemptive of common law. In *Mobil Oil Corp. v Higginbotham,* 436 US 618 (1978), for example, the Court held that the Death on the High Seas Act, 46 USC, §§ 761-768, a statute containing only eight sections, preempted federal common law in admiralty. And compare *Northwest Airlines, Inc. v Transport Workers Union,* 451 US 77 (1981), where this Court held that the Equal Pay Act, which comprised only one subsection of the Fair Labor Standards Act, 29 USC, § 206(d), and Title VII of the Civil Rights Act of 1964, 42 USC, §§ 2000e, *et seq.*, containing 17 sections, foreclosed the creation of a federal common law remedy in favor of the petitioner notwithstanding "a favorable reaction to the equitable considerations supporting petitioner's * * * claim". 451 US at 98.

and a mechanism for the law's enforcement was firmly in place. Moreover, as this Court observed in *Northwest Airlines, Inc. v Transport Workers Union,* 451 US 77, 97 (1981):

> "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme *including an integrated system of procedures for enforcement.* * * *" (Emphasis supplied.)

The Trade and Intercourse Act of 1793 is such a statute.

An examination of the relevant statutory language bears this point out. Section 1 of the Trade and Intercourse Act of 1793 provided that no person "shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license under the hand and seal of the superintendent of the department, or of such other person, as the President of the United States shall authorize to grant licenses for that purpose" (3a).* It required a bond "in the penal sum of one thousand dollars, payable to the United States, conditioned for the true and faithful observance of such rules, regulations and restrictions, as are or shall be made, for the government of trade and intercourse with the Indian tribes" *(id.)*. Section 2 authorized the person issuing the license "to recall the same, if the person so licensed shall transgress any of the regulations or restrictions * * * and shall put in suit such bonds, as he may have taken, on the breach of any condition therein contained" (3a). Section 3 provided that persons attempting to trade with Indian tribes or found in Indian country without such a license "shall forfeit all the merchandise offered for sale to the Indians, or found in his possession * * * and shall,

*References followed by the letter "a" are to the pages of the appendix to this brief.

moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days" (3a).

Section 4 of the 1793 Act provided that citizens or inhabitants of the United States who committed crimes in Indian territory against friendly Indians "which, if committed within the jurisdiction of any state * * * against a citizen thereof, would be punishable by the laws of such state * * * [would] be subject to the same punishment, as if the offence *[sic]* had been committed within the state or district, to which he or she may belong, against a citizen thereof" (3a).

Section 5 of the 1793 Act provided that "if any such citizen or inhabitant shall make a settlement on lands belonging to any Indian tribe * * * he shall forfeit a sum not exceeding one thousand dollars, nor less than one hundred dollars, and suffer imprisonment not exceeding twelve months * * * And it shall, moreover, be lawful for the President of the United States, to take such measures, as he may judge necessary, to remove from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who may have, or shall hereafter make, or attempt to make a settlement thereon" (4a).

Section 6 required a special license "to purchase any horse of an Indian, or of any white man in the Indian territory", and provided that persons so purchasing horses without such a special license would "forfeit, for every horse thus purchased, or brought from the Indian country, a sum not more than one hundred dollars, nor less than thirty dollars * * *" (4a).

Section 11 of the 1793 Act authorized the President and the territorial governors "on proof to them made, that any

citizen or citizens of the United States, or of the said districts, or either of them, have been guilty of any of the said crimes, offences *[sic]* or misdemeanors, within any town, settlement or territory, belonging to any nation or tribe of Indians, to cause such person or persons to be apprehended, and brought into either of the United States, or of the said districts, and to be proceeded against in due course of law" (5a).

Finally, section 12 of the 1793 Act provided that "all fines and forfeitures, which shall accrue under this act, shall be, one half to the use of the informant, and the other half, to the use of the United States, except where the prosecution shall be first instituted on behalf of the United States, in which case, the whole shall be to their use" (5a).

As the foregoing recitation makes clear, the Trade and Intercourse Act of 1793 was comprehensive both in terms of its scope and in the range of its enforcement mechanisms, which included forfeitures, criminal penalties, suspensions or revocations, and, ultimately, the direct involvement of the President of the United States.*

Moreover, as was observed by Judge Meskill in his dissent, Congress need not specifically legislate on a subject in order to preempt a particular field. In *Hines v Davidowitz,* 312 US 52 (1941), this Court held invalid under the Supremacy Clause a Pennsylvania alien registration statute which interfered with a subsequently enacted federal law involving the same subject, notwithstanding

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*Indeed, the very fact that the Second Congress vested remedial discretion in the Executive Branch lends strong support to the proposition that that body viewed these issues as essentially political in nature. This was suggested by Judge Meskill in his dissenting opinion (JA 249a), and his arguments in this regard are well taken.

the fact that the state and federal legislation were not explicitly contradictory and there was present no express Congressional intent to override State legislation. The underpinning of the *Hines* decision was the fact that the state statute fell into potential conflict with the federal law in the sensitive area of intergovernmental relations and that, since the federal government was the agent of foreign policy and had determined that a particular scheme of registration was necessary in order to avoid friction with other nations, the State statute had to fall. These same considerations apply with equal force here. As Judge Meskill stated (JA 253a):

> "The majority ignores the fact that the legislation at the heart of the instant dispute addresses issues of intergovernmental relations as sensitive as those in *Hines*. As the majority notes, President Washington and Secretary of War Knox urged congressional protection of Indian lands in order to reassure Indians who had grown 'restive'. This protection was provided by the 1790 Act; criminal and other sanctions were added in 1793 in order to put teeth in the 1790 Act. The statute at issue in *Hines* and in the instant dispute were passed for the same purpose, to avoid war. There can be no justification for finding preemption of state statutory law in the former case but not preemption of federal common law in the latter. Indeed, the present holding turns the normal presumptions about preemption on their respective heads, as federal courts are usually quicker to find preemption of federal common law than state law. *In re Oswego Barge Corp.*, 664 F2d 327 (2d Cir. 1981). *See Illinois v. Outboard Marine Corp.*, 680 F2d 473, 478 (7th Cir. 1982)."

In view of the great importance placed by the Congress and the President on the matter of Indian affairs in the 1790s, it is difficult to conceive that the Congress did not believe that it was speaking "directly and comprehensively" to the question of trade and intercourse with the Indians when it enacted the Trade and Intercourse Act of 1793. Moreover, and as was noted by Judge Meskill in his dissenting opinion below (JA 254a):

> "Given the hypertechnical nature of the law in the late 18th century, it is unrealistic to believe that Congress intended to allow remedies concurrent to those explicitly promulgated."

We submit that the Trade and Intercourse Act of 1793 did, in fact, preempt any common law right of action which the Indians might have possessed prior to that law's enactment and that the failure of the law to "speak directly" to the narrow issue of "common law rights" in no way alters this result. Cf. *Hines v Davidowitz*, 312 US 52 (1941).

2. ***An Indian Tribe does not possess an implied private right of action pursuant to the Trade and Intercourse Act of 1793.***

Nor is the Court of Appeals correct in holding that in enacting the Trade and Intercourse Acts, the Congress intended the Indian tribes to have a private right of action based upon its violation.

In *Daily Income Fund, Inc. v Fox*, ____ US ____, 104 S Ct 831, 78 L ed 2d 645 (1984), this Court was called upon to determine whether section 36(b) of the Investment Company Act of 1940, 15 USC, § 80a-35(b), which expressly provides that actions thereunder may be maintained either by the Securities and Exchange Commission,

or by a security holder on behalf of a registered investment company, but is silent as to the right of investment companies to bring such actions in their own behalf, created an implied right of action in an investment company. In holding that no implied right of action had been created by the Act, this Court set forth the factors relevant to the evaluation of such claims as follows, 78 L ed 2d at 655:

> "Petitioners nevertheless contend that an investment company has an implied right of action under § 36(b). In evaluating such a claim, our focus must be on the intent of congress when it enacted the statute in question. *Merrill Lynch, Pierce, Fenner & Smith v Curran,* 456 US 353, 377-378, 72 L Ed 2d 182, 102 S Ct 1825 (1982). That intent may in turn be discerned by examining a number of factors, including the legislative history and purposes of the statute, the identity of the class for whose particular benefit the statute was passed, the existence of express statutory remedies adequate to serve the legislative purpose, and the traditional role of the states in affording the relief claimed. *Ibid., Middlesex County Sewerage Authority v National Sea Clammers Assn,* 453 US 1, 13-15, 69 L ed 2d 435, 101 S Ct 2615 (1981); *California v Sierra Club,* 451 US 287, 292-293, 68 L Ed 2d 101, 101 S Ct 1775 (1981); *Cannon v University of Chicago,* 441 US 677, 60 L Ed 2d 560, 99 S Ct 1946 (1979); *Cort v Ash,* 422 US 66, 78, 45 L Ed 2d 26, 95 S Ct 2080 (1975). • • • "

Applying these factors to the case at bar, the conclusion is inescapable that the Congress did not intend the Indian tribes to have a private right of action under the Trade and Intercourse Act of 1793.

While it might perhaps be argued that the Trade and Intercourse Act was passed for the protection of the Indian tribes,* nothing contained in either the language of the 1793 Act or in its legislative history tends to support in the slightest the proposition that the sanctions and enforcement provisions contained therein were intended by the Congress to be anything other than exclusive. Certainly the fact that the Trade and Intercourse Act of 1793 was essentially a criminal statute militates strongly against any other conclusion (see, e.g., *Chrysler Corp. v Brown,* 441 US 281, 316 [1979]), as does the fact that the sanctions contained in the Act would, if utilized, have provided a full and adequate remedy to the Indians for its violation. Indeed, the very failure of Congress to have provided for a private right of action in favor of the Indians when it could so easily have done so, lends strong support to the proposition that Congress either did not wish to enact such a remedy or that it never considered the issue. In either event, the conclusion would be the same—no private right of action was intended. Cf. *Transamerica Mortgage Advisors v Lewis,* 444 US 11 (1979), where this Court refused

*In view of the fact that the Trade and Intercourse Act was passed in order to avoid a war with the Indian tribes, the "especial beneficiaries" of the Act may not in the eyes of Congress have been the Indian tribes at all, whose sovereign powers were severely limited thereby (see *United States v Wheeler,* 435 US 313, 326 [1978]), but may indeed have been the citizens of the United States themselves. In any event, since the Indians' rights under the statute can be fully vindicated by the United States acting in their behalf, it would be "unnecessary to infer a right of action in favor of the [Indians] in order to serve the statute's 'broad remedial purpose' ". *Daily Income Fund, Inc. v Fox, supra,* 78 L ed 2d at 659. And, cf. *Santa Clara Pueblo v Martinez,* 436 US 49 (1978), in which this Court observed, 436 US at 64:

> "Where Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other. • • • "

to recognize an implied right of action for damages under section 206 of the Investment Advisors Act of 1940, a statute very similar to the Trade and Intercourse Act of 1793.

The Court of Appeals relies in part for its conclusion that the Congress intended the Indian tribes to have a private right of action to enforce the prohibitions of the 1793 Trade and Intercourse Act, on the admittedly sparce legislative history of the Act, including speeches by President Washington and Secretary of War Knox, who urged passage of both the 1790 and 1793 versions of the statute. The court states in a footnote (JA 229a, n 15):

> "The only remnants of legislative history available indicate that President Washington, who was the moving force behind the 1790 and 1793 Acts, thought that they permitted the Indians to bring private causes of action. Cornplanter, Chief of the Seneca Indians * * * had met with President Washington in December 1790 to present their complaints about certain land transactions entered into during the prior decade. *American State Papers,* 1 *Indian Affairs* 139 (1834). Washington assured Cornplanter that at least after 1790, 'the case [was] entirely altered: * * * any treaty formed and held without [the federal government's] authority [was] not binding.' *Id.* Moreover, '[i]f * * * you have any just cause of complaint against and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other person.' *Id.* This speech was printed and communicated to Congress on January 11, 1792. *Id.* 142-43. Congress, therefore, was made aware of President Washington's perception of the reach of Indian law."

It is, of course, the intent of Congress, not simply the perception of the President, which is controlling. As this Court observed in *American Trucking Association v A. T. & S. F. R. Co.,* 387 US 397, 418 (1967):

> "The advocacy of legislation by an administrative agency—and even the assertion of the need for it to accomplish a desired result—is an unsure and unreliable, and not a highly desirable, guide to statutory construction. * * * "

Indeed, the conclusion reached by the Court of Appeals that the Congress, in 1793, intended to create an implied right of action in favor of the Indian tribes, flies in the face of the view, widely held until the late 19th or early 20th Century, that Indian tribes lacked the legal capacity to sue in federal court. See, e.g., *Felix v Patrick,* 145 US 317, 332 (1892); *Graham v United States,* 30 Ct Cl, 318, 336 (1895); *Seneca Nation v Christie,* 126 NY 122, 147 (1891), writ of error dismissed, 162 US 283 (1896); *Johnson v Long Island R.R. Co.,* 162 NY 462 (1900).*

Since it is the intent of the Congress viewed in "its contemporary legal context" to which the courts must look in determining whether an implied right of action in favor of the Indian tribes was intended (*Merrill, Lynch, Pierce, Fenner & Smith v Curran,* 456 US 353, 379 [1982]), and since the prevailing legal view in the late 18th Century was that Indian tribes lacked the capacity to sue in the federal courts (see, R. Clinton and M. Hotopp. *Judicial Enforcement of the Federal Restraints on Alienation of Indian*

*In *Graham v United States,* it was stated, 30 Ct Cl at 336:

> "The Indians being subject to the jurisdiction and control of the United States as 'domestic dependent nations,' they have no standing in the courts either as plaintiff or defendant except by statute, and under the act 1891, then only with the strong arm of the United States, as was held substantially in the *Jeager Case* (27 C. Cls. R., 278)."

Land: The Origins of the Eastern Land Claims, 31 Me L Rev 17, 46-49), it would be necessary, in order to support the conclusion of the court below, to ascribe to the Congress in 1793 the irrational intention of implying a private federal right of action with respect to a group which was not then believed to be capable of suing in the federal courts.* Such a conclusion is without logical foundation and should be rejected by this Court.

An equally strong basis for rejecting the implication of a private right of action in favor of the Oneidas lies in the fact that remedial discretion for trespasses upon lands protected by the Trade and Intercourse Act of 1793 was, by the plain language of the statute, specifically delegated to the President.

It need hardly be repeated here that the Constitution commits responsibility for the regulation of commerce with the Indian tribes to the Congress. US Const, Art I, § 8. However, insofar as the instant controversy is concerned, the Congress has explicitly delegated remedial discretion to the President. This is provided for by both the Trade and Intercourse Act of 1793 (3a-6a), and the Treaty with

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*In *Felix v Patrick, supra,* this Court said, 145 US at 330:

> "In reply to this defence [*sic*] of laches, plaintiffs rely mainly upon the fact that Sophia Felix and her heirs were at the time, and continued to be until 1887, tribal Indians, members of the Sioux nation, residing upon their reservation in the State of Minnesota, and incapable of suing in any of the courts of the United States. *We are by no means insensible to the force of this suggestion.* * * *" (Emphasis supplied.)

The Court said further, p 332:

> "It is scarcely necessary to say in this connection that * * * until this time [Indians] were not citizens of the United States, capable of suing as such in the Federal courts * * * ."

Six Nations (Treaty of Canadaigua), 7 Stat 44 (November 11, 1794) (JA 28a-30a), both of which are relied upon by the plaintiffs.

Section 5 of the Trade and Intercourse Act of 1793 prohibited, among other related activities, the making of any settlement by citizens or inhabitants of the United States on lands belonging to any Indian tribe. Beyond the establishment of specific criminal penalties, the law committed all other remedies to the discretion of the President (5a):

> "And it shall, moreover, be lawful for the President of the United States, to take such measures, as he may judge necessary, to remove from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who have made, or shall hereafter make, or attempt to make a settlement thereon."

Article VII of the Treaty with Six Nations contains an even broader delegation of remedial discretion to the President (JA 30a):

> "Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and the Six Nations agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place, but, instead thereof, complaint shall be made by the party injured, to the other: *By the Six Nations or any of them, to the President of the United States, or the Superintendent by him appointed * * * and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the*

*legislature * * * of the United States shall make other equitable provisions for the purpose.*" (Emphasis supplied.)

That the above-quoted provisions militate strongly against the implication of a private right of action is, we submit, manifest, and it follows that the Court of Appeals erred in wholly ignoring this major indicator of Congressional intent. Furthermore, in light of the plain language of the statute, it is clear that if any remedy is to be afforded the plaintiffs for the alleged illegal occupancy of the subject lands by the Counties, such remedy, having been committed to the President in the first instance, cannot properly be fashioned by the courts except at the behest of that officer. No such request was made here.

Moreover, and not incidentally, the express commitment of remedial discretion to the President renders the "political question" doctrine directly applicable to this case.

In the case of *Baker v Carr*, 369 US 186 (1962), this Court had occasion to discuss the "political question" doctrine at some length. The Court said, 369 US at 217:

> "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department * * * or the impossibility of deciding without an initital policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's

> undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Each of these "formulations" is, to a greater or lesser degree, "inextricable from the case at bar". *Id.*

Quite beyond the fact that, as is demonstrated above, *supra*, pp 24-26, remedial discretion in regard to settlements on Indian land has been committed to the Executive, the record in this case demonstrates that the issues raised by this litigation have, in fact, been presented to the President and that a political decision has already been made. As is witnessed by a letter dated March 15, 1968 from Robert L. Bennett, Commissioner of Indian Affairs, to Mr. Jacob Thompson, President, Oneida Indian Nation of New York (JA 42a-44a), the Oneidas had, on at least two occasions prior to the commencement of this action, petitioned the President pursuant to Article VII of the Treaty with Six Nations requesting the assistance of the United States in the prosecution of a claim against the State of New York based upon the alleged wrongful taking of Oneida lands during the period from 1788 to 1846. In declining to act upon these requests, the President, through his "superintendent", advised the Oneidas (JA 43a-44a):

> "The Oneidas have a claim currently pending before the Indian Claims Commission for the very injuries presently complained of. A petition * * * was filed on August 10, 1951 * * * which asks judgment against the United States for the fair market

value of Oneida lands sold to the State of New York between 1788 and 1946[*]. Trial has been scheduled for February 4, 1970.

"Since the United States has provided a forum for determining whether the Oneidas should be compensated for injuries sustained as a result of their eighteenth and nineteenth century dealings with the State of New York, no further government action on these claims seems necessary."**

In the face of the President's clear and considered decision to limit remedial action on the Oneidas' claims to the Indian Claims Commission, the courts below should properly have refused to entertain this lawsuit, implicating as it does both a "policy determination of a kind clearly for nonjudicial discretion" and "a political decision already made". *Baker v Carr,* 369 US at 217. Furthermore, if the lower courts' "independent resolution" of this matter does not actually express a "lack of the respect due coordinate branches of government", it certainly leaves open the very real possibility, should the Oneidas again petition the President, "of embarrassment from multifarious pronouncements by various departments on one question". *Id.*

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*This should read 1846.

**That proceeding, in which the Oneidas successfully argued that the United States had breached its fiduciary duty to protect them in land dealings with the State of New York (See *United States v Oneida Nation of New York,* 477 F2d 939, 201 Ct cl 546 [1973]), has since been terminated by a voluntary dismissal with prejudice, presumably agreed upon because the Oneidas feared that a recovery in that proceeding would bar a recovery here. *Oneida Indian Nation of New York v County of Oneida,* 622 F2d 624, 628 (2d Cir, 1980). In view of the fact that the prior proceeding has been terminated, there now exists no good reason why the Oneidas should not again seek the assistance of the President in the resolution of their claims as is provided for by the Treaty with Six Nations.

Finally, this lawsuit implicates a further element of the political question doctrine which bears discussion. The interpretation of the Trade and Intercourse Acts by the State of New York for close to two hundred years has been relied upon by countless innocent individuals who have accepted title to lands within the area of the Oneidas' claims. By any conceivable judicial resolution of this matter not wholly adverse to the plaintiffs, every title within the claim area would be put into question, and every individual living within the area may be subject to ejectment or to damages in trespass for each and every day that he or she remained in occupancy. That a "significant measure of chaos" would "inevitably" result from such a ruling cannot be gainsaid, and it is the avoidance of such a consequence which is one of the cornerstones of the political question doctrine. *Baker v Carr, supra,* at page 219. As was so aptly stated by Judge Meskill in his dissenting opinion (JA 249a):

"This is not to deny the wrongs that Indian tribes have suffered. They do exist and surely require attention. However, the remedy should not be created by a court of law acting in an environment of legal uncertainty. These are essentially political problems which require a comprehensive solution that the judiciary cannot provide in one sitting. * * * "

Here, the implication of a private right of action by the court below seems to have rested in large measure on the view below (JA 228a-229a) that the President or the Executive had failed in its obligations to protect Indian rights. But this Court has previously made plain that judicial dissatisfaction with the Executive provides no basis for implying judicial causes of action where enforcement authority has been vested specifically in the Executive. *Employees v Missouri Department of Public Health and Welfare,* 411 US 279, 285-287 (1973).

We submit that an Indian tribe does not enjoy a private right of action under the federal common law or pursuant to the Trade and Intercourse Act of 1793 to recover damages for the use and occupation of lands allegedly obtained from said Indian tribe in violation of the Trade and Intercourse Act. The Court of Appeals should so have held.

B. The Court of Appeals erred in rejecting any defense based upon the statute of limitations.

The plaintiffs' claim should, in any event, have been held by the Court of Appeals to be barred by the applicable federal statute of limitations. It has long been the rule in the federal courts that, unless the United States is suing in its sovereign capacity, or unless the Congress has specifically provided otherwise, the issue of timeliness of federal causes of action is governed by the most analogous state statute of limitations. See, e.g., *McClury v Silliman,* 28 US (3 Pet) 270 (1830); *Campbell v Haverhill,* 155 US 610 (1895); *Auto Workers v Hoosier Cardinal Corp.,* 383 US 696 (1966).* It follows from this that unless there exists a federal limitations period which is controlling of this action, the courts below should properly have looked to the law of New York in determining the issue of timeliness.** And this is so notwithstanding the fact that this action was brought by Indians. See, *Wilson v Omaha Indian Tribe,* 442 US 653, 671-673 (1979).

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*This rule is, of course, fully consistent with the Rules of Decision Act, 28 USC, § 1652, which declares "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply".

**The most nearly analogous New York State Statute of Limitations is contained at New York Civil Practice Law and Rules, § 212, which provides that

(Footnote continued on following page.)

The Court of Appeals, tacitly acknowledging the absence of a federal limitations period expressly applicable to the Oneidas' 1795 claim,* and citing to *Occidental Life Ins. Co. v EEOC,* 432 US 355 (1977), asserts that the application of New York's statute of limitations "would permit a violation of the 1793 Act to go unremedied, and thus would be patently inconsistent with the Trade and Intercourse Acts" (JA 232a). The court asserts further that since the United States would not be subject to state delay-based defenses if it were to bring suit on behalf of the tribal plaintiffs, it " 'would be anomalous to allow the trustee to sue under more favorable conditions that [*sic*] those afforded the tribes themselves' " (*id.*). These asseverations are not only contradictory since if the United States were to sue on behalf of the plaintiffs the alleged "violation" would clearly not "go unremedied", but there is absolutely nothing anomalous in allowing suit by the United States under conditions where its so-called Indian "wards" could not. This is the teaching of *United*

(Footnote continued.)

> "An action to recover real property or its possession cannot be commenced unless the plaintiff, or his predecessor in interest, was seized or possessed of the premises within ten years before the commencement of the action."

Pursuant to section III of chapter 63 of the Laws of New York of 1788 (passed February 26, 1788), which was in effect in 1795, possessory actions based upon the possession of the suitor's ancestors had to be brought within 50 years; pursuant to section IV of that law, possessory actions based upon the suitor's own possession had to be brought within 30 years.

*The court's reliance upon 28 USC § 2415, as providing "some guidance in the present situation" (JA 232a), is not well taken inasmuch as that statute explicitly applies only to suits brought by the United States. The legislative history of section 2415 bears this point out. See, e.g., Cong Rec V. 123, p 22170 (July 11, 1977) (Remarks of Mrs. Collins); p 22500 (July 12, 1977) (Remarks of Mr. Foley); p 22507 (Remarks of Mr. Dicks); p 22508 (Remarks of Mr. Foley); p 22510 (Remarks of Mr. Udall).

States v Minnesota, 270 US 181 (1926), and there exists no good reason why that case should not be followed here.

We submit that the Court of Appeals erred in failing to apply the New York statute of limitations to this suit, which was admittedly instituted 175 years after the cause of action accrued, and there should consequently be a reversal.*

C. The Treaty of 1795 between the Oneida Indian Nation and the State of New York has been ratified by the United States.

The Court of Appeals' rejection of the defense of ratification was likewise erroneous. It has, we submit, long been established that the United States may, by its subsequent actions, ratify, and thereby validate, transfers of land by Indian tribes which could otherwise be voided because of the Trade and Intercourse Acts. See, *Seneca Nation of Indians v United States,* 173 Ct Cl 912 (1965); cf. *De Coteau v District County Court,* 420 US 425 (1975); *Rosebud Sioux Tribe v Kneip,* 430 US 584 (1977).

In *Seneca Nation of Indians v United States, supra,* the Seneca Nation sued the United States for indemnification

*The State does not wish to be understood as arguing that delay-based defenses may be employed by a defendant to "bar the rights of [Indians] in lands subject to statutory restrictions". *Ewert v Bluejacket,* 259 US 129, 138 (1922); but see, *Felix v Patrick,* 145 US 317, *supra.* However, as was observed by the New York Court of Appeals in *Seneca Nation v Christie, supra,* the "question is not whether an Indian title can be barred by adverse possession or by state statutes of limitations", 126 NY at 147, but whether "the Statute of Limitations is a bar to the *action*", *id.*; emphasis supplied. Since the Trade and Intercourse Act of 1793 explicitly delegated remedial discretion to the Executive, it would in no way be inconsistent with the "underlying policies of the * * * statute" for this Court to hold that, if a private right of action in favor of the plaintiffs exists, the timeliness of the action must be measured against the New York statute of limitations. Indeed, since the Executive would continue to enjoy the power to remedy violations of the Act, such a holding would be more consonant with the policies underlying the statute than otherwise.

for a tract of land taken by the State of New York by eminent domain during the middle of the 19th Century. In rejecting the Senecas' contention that the United States, as fiduciary, was responsible to the Seneca Nation for not having recaptured the acreage, which had allegedly been taken in contravention of the Trade and Intercourse Act, 25 USC, § 177, the Court of Claims held, *inter alia,* 173 Ct Cl at 915:

> "if federal consent was needed under the Trade and Intercourse Act, such approval has been given. All agree that appellant would have no complaint if assent had been given at the time of the appropriations. *But approval can also come afterwards*, and that is what happened here. In 1927, Congress provided that New York's game and fish laws should thereafter apply to the Senecas' Oil Spring Reservation (among others), except 'that this Act shall be inapplicable to lands formerly in the Oil Spring Reservation and heretofore acquired by the State of New York by condemnation proceedings.' Act of January 5, 1927, ch 22, 44 Stat. 932, 933. This *explicit recognition and implicit ratification* of New York's ownership of the tract must be taken as Congress's [*sic*] approval of the original appropriation, as well as of the state's continued claim of right * * * [footnotes omitted]". (Emphasis supplied.)

In the instant case, both "explicit recognition and implicit ratification" of the 1795 conveyance are provided by the Treaties of June 1, 1798 and June 4, 1802 (JA 36a-37a, 38a-40a).

The Treaty of June 1, 1798, which was federally supervised, and by which the Oneida Nation ceded to the State of New York certain of its lands, contains the following language (JA 36a-37a):

"the said [Oneida] Indians do cede release and quit claim to the People of the State of New York forever All the Lands within their Reservation to the Westward and Southwestward of a Line from the Northeastern corner of Lot No. 54 *in the last purchase from them* [*] running northerly to a button wood tree * * * standing on the bank of the Oneida Lake * * * And * * * do further Cede that a tract of Twelve Hundred and Eighty Acres, as Follows—that is to say Beginning in the South east Corner of Lot No. 59, *in the said last Purchase* * * *." (Emphasis supplied.)

Similarly, the Treaty of June 4, 1802, which was also federally supervised, contains the following language (JA 38a-39a):

"The said [Oneida] Indians do Cede release and quit claim to the people of the State of New York forever * * * All that certain Tract of Land beginning at the Southwest corner of the Land lying along the Genesee Road, and which was ceded in the year One thousand Seven hundred and Ninety eight by the said Oneida Indians to the people of the State of New York, and running thence along the last mentioned Tract, easterly to the southeast corner thereof thence southerly in the direction of the continuation of the east bounds of said last mentioned tract, *to other lands heretofore ceded by the said Oneida Nation of Indians to the people of the State of New York* * * *." (Emphasis supplied.)

We submit that the use of the phrase "last purchase" in the 1798 Treaty, and the phrase "heretofore ceded" in the Treaty of 1802, demonstrate both an awareness and an approbation on the part of the United States of the 1795

*It is acknowledged by the Court of Appeals that the "last purchase" referred to the 1795 transaction (JA 235a-236a).

transaction. Certainly had the Federal government wished to convey the message that the latter treaties did not constitute such approval, it could easily have done so while still employing the 1795 boundaries for descriptive purposes.* That it did not do so, we submit, constitutes additional evidence of ratification.

Furthermore, it is of no little significance that, at least since 1795, the land here at issue has been treated by both the State of New York and the federal government as being under the jurisdiction of New York. As this Court was moved to observe in *Rosebud Sioux Tribe v Kneip, supra*, 430 US at 603-605:

"Since state jurisdiction over the area within a reservation's boundaries is quite limited * * * the fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority is a factor entitled to weight as a part of the

*The Court of Appeals' rejection of the defense of ratification was based in part upon the court's view that the "isolated references to land boundaries in the 1798 or 1802 treaties" amounted to "little more than 'metes and bounds' descriptions", which were not "sufficient to constitute ratification of the 1795 transaction" (JA 236a). This holding completely ignores the fact that in describing the 1795 transaction as a "purchase" and in describing the subject lands as having been "heretofore ceded", the drafters of the 1798 and 1802 Treaties were employing specific and not general language, and that the use of that terminology could not reasonably have been interpreted to mean anything other than that the 1795 purchase had been deemed effective to pass good title. Nor is the Court of Appeals correct in its assertion that there "is no evidence that the federal authorities were then aware of any claim of illegality of the prior land sale" (JA 237a). The District Court specifically found that both Secretary of War Timothy Pickering, and Israel Chapin, Jr., Superintendent of Affairs of the Six Nations, were aware of New York's attempts to deal with the Oneidas in 1795 and had attempted to prevent the tribe from consummating any transaction (JA 55a-57a). The clear message that emerges from the use of the terms "purchase" and "cession" in the later treaties, therefore, is that the attitude of the Government had changed and that it by then recognized the validity of the 1795 purchase.

'jurisdictional history.' The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as petitioner urges * * * [Citations and footnotes omitted]."

These same considerations apply with equal force to the case at bar. It is our position that the language employed in the Treaties of 1798 and 1802 constitutes a plain and unambiguous expression of federal ratification of the 1795 Treaty, and the Court of Appeals' holding to the contrary should therefore be rejected.

POINT II.

The Court of Appeals erred in holding the State liable for indemnification of the Counties on their cross claim.

A. Since the federal courts would lack jurisdication over the State in an original action brought against the State by the Counties because of the State's sovereign immunity, the courts also lack ancillary jurisdiction on the same issues.

In ruling that the District Court possessed ancillary jurisdiction over the Counties' third-party claims against the State of New York, the Court of Appeals focused its attention solely upon the question of whether the Counties' actions for indemnification arose out of the "same core of facts" as did the Oneidas' claims against the Counties and, having concluded that they did, held that no independent basis for jurisdiction was necessary (JA 244a). However, as this Court's recent decision in *Pennhurst State School & Hosp. v Halderman,* US , 79 L ed 2d 67 (1984),

makes clear, the focus of the Court's inquiry was too narrow, and because the third-party defendant in this case is a nonconsenting State, the indemnification action should have been dismissed.*

In *Pennhurst State School & Hosp. v Halderman, supra,* this Court had before it the question of whether the doctrine of pendent jurisdiction could "be viewed as displacing the explicit limitation on federal jurisdiction contained in the Eleventh Amendment". 79 L ed 2d at page 90. In specifically rejecting any such contention, the Court stated, *id.* at page 92:

> "contrary to the view implicit in decisions such as [*Greene v Louisville & Interurban R. Co.,* 244 US 499 (1917)], *supra,* neither pendent jurisdiction *nor any other basis of jurisdiction* may override the Eleventh Amendment. *A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment.* We concluded above that a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment. See *supra,* at , 79 L Ed 2d 82. *We now hold that this principle applies as well to state-law claims brought into federal court under pendent jurisdiction* [footnote omitted]." (Emphasis supplied.)

In *Aldinger v Howard,* 427 US 1 (1976), these principles were discussed in relation to a third-party claim. This Court stated, 427 US at page 18:

> "If the new party sought to be joined is not otherwise subject to federal jurisdiction, there is a more

*Although the holding in *Pennhurst* relates specifically to "pendent" jurisdiction rather than to "ancillary" jurisdiction, the Court's analysis of the jurisdictional issue is, we submit, equally relevant to either.

> serious obstacle to the exercise of pendent jurisdiction than if parties already before the court are required to litigate a state-law claim. * * *"

In *Aldinger, supra*, the Court held that a county could not be included as a party in a federal action simply because it might be required to indemnify the other defendant under state law. The Court explained that even though the third-party claims would be within the scope of Article III jurisdiction because of a "common nucleus of operative facts", it must also be determined if federal jurisdiction may otherwise be negated. While in that case the Court focused on Congressional intent, *Pennhurst, supra*, makes clear that an immunity to suit under the Constitution represents an equally strong barrier to a third-party claim.* We submit that there is no meaningful difference between *Aldinger* and the present case merely because here the third party from whom indemnity is sought has been brought in by the defendant rather than by the plaintiff, although we recognize that in *Aldinger*, the Court declined to determine if there existed any " 'principled' differences between pendent and ancillary jurisdiction * * *".

In the case at bar, the Court of Appeals erred in completely disregarding the constitutional impediment to the Counties' actions—the State's sovereign immunity. This point was considered in *United States v United States Fidelity & Guaranty Co.*, 309 US 506 (1940), where this Court said, page 513:

> "Against this conclusion respondents urge that as the right to file the claim against the debtor was transitory, the right to set up the cross-claim properly

*Article III of the Constitution originally provided that the federal courts had jurisdiction in controversies "between a State and citizens of another state". The Eleventh Amendment limited that power by providing it did not extend to suits prosecuted by a citizen or subject of a foreign State against a State. *Hans v Louisiana*, 134 US 1, 13 (1890), held that the bar included actions by citizens of the same State.

> followed the main proceeding. The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity. The sovereign possessing immunity should not be compelled to defend against cross-actions away from its own territory or in courts not of its own choice, merely because its debtor was unavailable except outside the jurisdiction of the sovereign's consent [footnote omitted]. * * *"

Jones v Scofield Bros., Inc., 73 F Supp 395 (D Md, 1947), illustrates this limitation with respect to States. In *Jones*, the original defendant sought a judgment against the State Roads Commission of Maryland as a third-party defendant. The Commission, as a State agency, claimed Eleventh Amendment immunity. The court there granted a motion to dismiss the third-party complaint against the State Roads Commission as third-party defendant, saying that the doctrine of sovereign immunity is still the law and that while many jurisdictions have waived or partially waived their immunity to suit, Maryland had not done so. The court held that the Commission was immune from suit and that the advisability of the immunity was a legislative question.

The court below relied on *Agrashell, Inc. v Bernard Sirotta Co.*, 344 F2d 583 (2d Cir, 1965); *Dery v Wyer*, 265 F2d 804 (2d Cir, 1959), and *Ayer v General Dynamics Corp.*, 82 FRD 115 (SDNY, 1979). However, those cases are inapposite; none of them deal with a State as a third-party defendant. In all three, the courts held that no independent ground for jurisdiction against a third-party defendant is necessary in an action where the court's original jurisdiction was based upon diversity grounds. The need for complete diversity, however, is a judicial determination and one which was within the power of Congress to have changed. In those cases, there was involved no constitutional objection to jurisdiction. In the instant case, quite to the

contrary, lack of jurisdiction over the State is not based upon statutory grounds or court determinations, but upon constitutional grounds. Neither the convenience of the litigants nor considerations of judicial economy can serve to override the Constitution; neither should suffice to justify extension of the doctrine of ancillary jurisdiction to permit a suit against a nonconsenting State where the State has not waived its sovereign immunity* and where no independent basis for jurisdiction exists. Cf. *Pennhurst State School & Hosp. v Halderman, supra* at page 93.

We submit that in order for a federal court to obtain ancillary jurisdiction over a State, the State must be independently subject to federal jurisdiction. In this case, no independent basis for jurisdiction exists. The Counties' third-party complaints should consequently have been dismissed.

B. The Court of Appeals erred in holding that the State of New York had, by negotiating treaties with the Oneidas, impliedly waived its immunity to suit in federal court by non-Indian claimants, the only claimants against the State involved here.

The court below, in holding that the State of New York, by dealing with the Oneida Indians in alleged violation of the Trade and Intercourse Act of 1793, had impliedly consented to a waiver of its Constitutional immunity for suits

*Even if it were assumed that the State's acts in dealing with the Oneidas would constitute a waiver of immunity if the Oneidas were seeking relief from the State, there is simply no reasoned basis for extending such a waiver to the Counties' dealings with the State. It is vital to bear in mind that in these third-party actions for indemnification, the Counties do not stand in the stead of the Oneidas. The Counties' actions are not Indian actions. They are simply actions for money damages as indemnity resulting from an alleged breach of implied warranties. The only forum where such an action may properly be brought is in the New York State Court of Claims. See, *Great Northern Life Ins. Co. v Read*, 322 US 47, 54 (1944).

by the Counties has, we submit, totally misread and misapplied the teachings of this Court in *Edelman v Jordan*, 415 US 651 (1974); *Employees v Missouri Department of Public Health and Welfare*, 411 US 279 (1973), and *Parden v Terminal Railway Co.*, 377 US 184 (1964).

The mere fact that New York may have entered into a federally regulated sphere of activity in dealing with the Oneidas is, under this Court's decisions, plainly insufficient, in and of itself, to constitute a waiver of the State's immunity. And, quite contrary to the decision below, there is especially no basis for such a conclusion with respect to the State's dealing with non-Indian third parties, the only type of parties suing the State here.

In *Edelman v Jordan*, 415 US 651 (1974), this Court emphasized that in cases involving a State, the first question that must be considered is whether Congress has authorized a suit to be brought against a class of defendants which includes the States. Justice Rehnquist noted in *Edelman* at page 672:

> "But in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent. * * *"

Such authorization is also missing from the Trade and Intercourse Act even if, contrary to our position in Point I, a right of action against private parties were implied.

The logic of the Court's position in *Edelman* is compelling. The ultimate question before a court looking at an alleged implied waiver of the Tenth or Eleventh Amendments is whether Congress intended to require that waiver. See, *Pennhurst State School & Hosp. v Halderman, supra,* 79 L ed 2d at 77-78. This question was never addressed by the Court of Appeals. We submit that there is contained

in the Trade and Intercourse Act not the slightest evidence of a Congressional intent to create a private right to sue a State in the federal courts, and the Court of Appeals should so have held.

The basic reliance of the court below (JA 246a-248a) on *Parden v Terminal Railway Co.*, 377 US 184 (1964), is misplaced for other reasons as well. There, this Court held that Alabama, by operating a railroad in a proprietary manner for a profit in interstate commerce, had impliedly waived its immunity to suits in the federal courts. The court below characterized the State's acquisition from the Oneidas as proprietary (JA 247a) and found *Parden* controlling. But New York's acts in securing possession of lands to which it held legal title as sovereign* and making it available for settlement were acts of a sovereign nature and the State was not engaging in private enterprise. The importance of this point cannot be overstated because in *Employees, supra,* 411 US 279 (1973), this Court *limited* application of *Parden* to cases in which the States were engaged in profit-making commercial programs. In *Employees,* State employees sought overtime compensation which was allegedly due them under the Fair Labor Standards Act (29 USC, § 216[b]). In holding that the State of Missouri was immune from suit in the federal courts based upon alleged violations of the Act, this Court distinguished *Parden,* saying, 411 US at page 284:

> "The history and tradition of the Eleventh Amendment indicate that by reason of that barrier a federal court is not competent to render judgment against a nonconsenting State. *Parden* involved the railroad business which Alabama operated 'for profit'. 377 U.S., at 185. *Parden* was in the area

*Title to the lands had been in the State of New York since the successful conclusion of the Revolutionary War. It was, however, encumbered by the Oneida Indians' right of occupancy. See, e.g., *Clark v Smith*, 38 US (13 Pet) 195 (1839).

> where private persons and corporations normally ran the enterprises."

The Court added, page 285:

> "It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution. Thus, we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum."

The Court said further, pages 286-287:

> "It is true that, as the Court said in *Parden,* 'the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.' 377 U.S., at 191. But we decline to extend *Parden* to cover every exercise by Congress of its commerce power, where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the States and putting the States on the same footing as other employers is not clear."

Moreover, this Court in *Employees* distinguished *Parden* on the further grounds, equally applicable here, that another remedy existed; specifically, there the Secretary of Labor was authorized to enforce the rights of individual employees by actions against employers, including States. Those provisions, the Court said, 411 US at 286:

> "suggest that since private enforcement of the Act was not a paramount objective, disallowance of suits by state employees and remitting them to relief through the Secretary of Labor may explain

why Congress was silent as to waiver of sovereign immunity of the States * * *."

Here, the President was also given remedial authority, a fact that just as in *Employees* militates strongly against a remedy of waiver by the State. Indeed, this is especially so since the claimed waiver here relates not to suits by Indians, but rather solely to the cross-claims of the Counties.

Finally, in this regard, the words of this Court in *Pennhurst State School & Hosp. v Halderman, supra,* are well worth repeating in their entirety. The Court observed, 79 L ed 2d at 77-78:

> "A sovereign's immunity may be waived, and the Court consistently has held that a State may consent to suit against it in federal court. See, e.g., *Clark v Barnard,* 108 US 436, 447, 27 L Ed 780, 2 S Ct 878 (1883). We have insisted, however, that the State's consent be unequivocally expressed. See, e.g., *Edelman v Jordan,* 415 US 651, 673, 39 L Ed 2d 662, 94 S Ct 1347 (1974). Similarly, although Congress has power with respect to the rights protected by the Fourteenth Amendment to abrogate the Eleventh Amendment immunity, see *Fitzpatrick v Bitker,* 427 US 445, 49 L Ed 2d 614, 96 S Ct 2666 (1976), we have required an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.' *Quern v Jordan,* 440 US 332, 342, 59 L Ed 2d 358, 99 S Ct 1139 (1979) (holding that 42 USC § 1983 [42 USCS § 1983] does not override States' Eleventh Amendment immunity). Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system. A State's

> constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued. As Justice Marshall well has noted, '[b]ecause of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of the federal judicial power has long been considered to be appropriate in a case such as this.' *Employees v Missouri Public Health & Welfare Dep't,* 411 US 279, 294, 36 L Ed 2d 251, 93 S Ct 1614 (1973) (Marshall, J., concurring in result). Accordingly, in deciding this case we must be guided by '[t]he principles of federalism that inform Eleventh Amendment doctrine.' *Hutto v Finney,* 437 US 678, 691, 57 L Ed 2d 522, 98 S Ct 2565 (1978) [footnotes omitted]." (Emphasis in original.)

We submit that the Court of Appeals erred in holding that New York's sovereign immunity is not a bar to the Counties' third-party actions against the State; a reversal on this ground is fully warranted.

C. Substantive New York law does not permit the imposition of an award against the State in an amount other than that specifically provided by the New York Law of Real Property.

Finally, and quite apart from the issues of jurisdiction and sovereign immunity, we submit that the Court of Appeals simply erred in holding that the Counties were entitled to any but the relief specifically provided for by the New York law of real property. In relying for its holding upon authorities speaking generally to New York's law of indemnity,* the court below wholly ignored the fact that the Counties' actions against the State are essentially an attempt to imply a warranty of title for the convevance of

*None of the authorities relied upon by the court below (JA 244a-245a) involved the New York law of real property.

real property by the State. As such, it was New York's law of real property to which the Court of Appeals should have looked in fashioning a remedy, and the fact that it did not do so constituted serious error.

The claims against New York stem from the alleged wrongful act of the State in acquiring Indian lands in violation of the Trade and Intercourse Act and the subsequent conveyance of those lands through mesne to the Counties in the early 1800s. They are at bottom contract claims and thus depend for their vitality on the demonstration of a contractual relationship to indemnify for failure of title either by express or implied covenant. Here, no such demonstration has been made.

Nowhere is it alleged that the patents issued by the State of New York contained any covenants. Indeed, the practice of New York was to issue quit claim patents in the early 1800s when these patents must have been issued and such patents were at the sole risk of the purchaser as to the validity of the title granted. See, Getman, *Principles and Source of Title to Real Property as Between the State and the Individual and the Relative Rights of Individuals* (1921), page 240. Moreover, New York law does not recognize an implied warranty of title for real property. See, generally, Thompson, *Real Property Law,* 1941, Vol 7, page 161, § 3676; see, also, New York State Real Property Law, § 251, which provides that a covenant is not implied in a conveyance of real property, whether the conveyance contains any special covenant or not. (Section 251 of the New York State Real Property Law can be traced back to the adoption of the first Revised Statutes. It appears in the Revised Statutes of 1827, Part II, chapter 1, title 2, article 4, section 140.*) An examination of New York case law bears this point out as well.

*Section 140 reads as follows:

> "No covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not."

Section 140 was a codification of New York State common law. See, *Frost, Cole and Crosby v Raymond,* 11 Caine 188 (Sup Ct, 1804).

In *Burwell v Jackson,* 9 NY 535 (1854), the Court of Appeals distinguished between a contract for the sale of real property and a deed of conveyance of property, holding that while a contract implies a promise that the seller will convey good title to property a deed does not. The purchaser may refuse the land if there exists a defect in title. After this grant is accepted, this right terminates.

In *Whittemore v Farrington,* 76 NY 452 (1879), the Court again held there was no implied warranty of title. In *Whittemore,* the Court also held, page 458:

> "Where both parties are innocent of fraud and both know the character and contents of the instrument, it cannot be reformed in equity merely on the ground that one of the parties would have exacted, and would have been entitled to exact, a different instrument had he been acquainted with facts rendering it to his interest to do so, or which, if he had known them, would have caused him to reject the instrument which he accepted. *It is beyond the power even of a court of equity to make contracts for parties.* * * *" (Emphasis supplied.)

This, in effect, is what the court below did here.

In *Coffin v The City of Brooklyn,* 116 NY 159 (1889), this rule was applied with respect to a purchase from the City of Brooklyn. There, the Court held there was no cause of action in favor of the grantee against the grantor City because the tax sale, through which the City claimed its rights, was defective. The tax sale in that case is analogous to a patent of lands to which the sovereign has acquired a defective title. In *Coffin,* the Court held that not only was a warranty not implied but the only warranties that could have been made were under existing statutory authority. In the instant case, no statute creating a warranty has even been alleged.

People ex rel. Hall v Woodruff, 57 App Div 342 (3d Dept, 1901), considers the question of implied covenants in a patent. The court stated the following, page 346:

> "Under this provision, the commissioners issued to the relator letters patent in the form which had been adopted by the board. This form is merely a quitclaim. It contains no covenants, and expressly provides that 'These Presents shall in no wise operate as a warranty of title.' The effect of these letters patent was to convey to the relator only such interest in the land as the grantor had. There was no implied covenant of warranty, and in case of failure of title the grantee was without any remedy against the grantor. (2 R.S. [9th ed.] 1812, § 140; *Murray v. Ballou,* 1 Johns. Ch. 577; *Burwell v. Jackson,* 9 N. Y. 541; *Mayor v. Mabie,* 13 *id.* 158.)"

Because of this absence of remedy the Revised Statutes of 1827, Part I, chapter 9, title 5, article 1 (now Public Lands Law, § 6) was enacted which provides that where title to lands patented by the State fails, a claim may be made for the refund of the purchase price to the Commissioner of the Land Office. *People ex rel. Ostrander v Chapin,* 109 NY 177 (1888), in dealing with this section stated that the refund may be made to the purchaser, his representatives or assignees and further held that the grantee of the original purchaser is an assignee under that section.

It follows from the foregoing that no covenant to indemnify arose because of the conveyance by the State and only the statutory rights under Public Lands Law, § 6 are available to the Counties. Under that section, a claim may

be made for the refund of the purchase price to the Commissioner of General Services (successor to the Commissioner of the Land Office). If satisfied with the facts, the Commissioner may certify this to the Court of Claims. In such a case, the Court of Claims is empowered to award damages to the holder of the patented lands but damages are limited so as not to exceed the purchase price originally paid for such lands.* The Counties' remedy in this case is limited to those provided under Public Lands Law, § 6. Any other conclusion would completely upset the law of real property.

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*The award of interest is not contemplated by the statute.

CONCLUSION.

For the reasons stated, the judgment of the Court of Appeals should be reversed.

Dated: Albany, New York
June, 1984

Respectfully submitted,

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APPENDIX—CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

U. S. Constitution, Article I, Section 8, Subd. 3.

"The Congress shall have Power.—

"Regulation of commerce—3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

U. S. Constitution, Article III, Section 2, Subd. 1.

SECTION 2.

"Jurisdiction of Federal courts.—

1. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

U. S. Constitution, Tenth Amendment.

ARTICLE X.

"Powers not delegated, reserved to States and people respectively.—The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

U. S. Constitution, Eleventh Amendment.

ARTICLE XI.

"Judicial power of United States not to extend to suits against a State.—The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Trade and Intercourse Act of 1793.

STATUTE II.

March 1, 1793.

CHAP. XIX—*An Act to regulate Trade and Intercourse with the Indian Tribes.*

[Repealed.]

May 19, 1796, ch. 30.

Trade with the Indian tribes to be under licenses.

1790, ch. 33.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license under the hand and seal of the superintendent of the department, or of such other person, as the President of the United States shall authorize to grant licenses for that purpose; which superintendent, or person so authorized shall, on application, issue such license, for a term not exceeding two years, to any proper person, who shall enter into bond with one or more sureties approved of by the superintendent, or person issuing such license, or by the President of the United States, in the penal sum of one thousand dollars, payable to the United States, conditioned for the true and faithful observance of such rules, regulations and restrictions, as are or shall be made, for the government of trade and intercourse with the Indian tribes. The said superintendents, and persons licensed, as aforesaid, shall be governed, in all things touching the said trade and intercourse, by such rules and regulations, as the President of the United States shall prescribe.

Power of the person granting such license.

SEC. 2. *And be it further enacted,* That the superintendent, or person issuing such license, shall have full power and authority to recall the same, if the person so licensed shall transgress any of the regulations or restrictions, provided for the government of trade and intercourse with the Indian tribes, and shall put in suit such bonds, as he may have taken, on the breach of any condition therein contained.

SEC. 3. *And be it further enacted,* That every person, who shall attempt to trade with the Indian tribes, or shall be found in the Indian country, with such merchandise in his possession, as are usually vended to the Indians, without lawful license, shall forfeit all the merchandise offered for sale to the Indians, or found in his possession, in the Indian country, and shall, moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days, at the discretion of the court, in which the trial shall be: *Provided*, That any citizen of the United States, merely travelling through any Indian town or territory, shall be at liberty to purchase, by exchange or otherwise, such articles as may be necessary for his subsistence, without incurring any penalty.

Forfeiture on attempting to trade without a license.

SEC. 4. *And be it further enacted,* That if any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement, or territory, belonging to any nation or tribe of Indians, and shall there commit murder, robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen thereof, would be punishable by the laws of such state or district, such offender shall be subject to the same punishment, as if the offence had been committed within the state or district, to which he or she may belong, against a citizen thereof.

Punishment on committing crimes against friendly Indians.

SEC. 5. *And be it further enacted,* That if any such citizen or inhabitant shall make a settlement on lands belonging to any Indian tribe, or shall survey such lands, or designate their boundaries, by marking trees, or otherwise, for the purpose of settlement, he shall forfeit a sum not exceeding one thousand dollars, nor less than one

Forfeiture in cases of settlement on their lands.

hundred dollars, and suffer imprisonment not exceeding twelve months, in the discretion of the court, before whom the trial shall be: And it shall, moreover, be lawful for the President of the United States, to take such measures, as he may judge necessary, to remove from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who have made, or shall hereafter make, or attempt to make a settlement thereon.

SEC. 6. *And be it further enacted,* That no person shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license, the superintendent, or such other person, as the President shall appoint, is hereby authorized to grant, on the same terms, conditions, and restrictions, as other licenses are to be granted under this act: *Provided also,* That every person, who shall purchase a horse or horses, under such license, before he exposes such horse or horses for sale, and within fifteen days after they shall have been brought out of the Indian country, shall make a particular return, to the superintendent, or other person, from whom he obtained his license, of every horse by him purchased, as aforesaid, describing such horses, by their color, height and other natural or artificial marks, under the penalties contained in their respective bonds. And every person, purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall, for every horse thus purchased and brought into any settlement of citizens of the United States, forfeit, for every horse thus purchased, or brought from the Indian country, a sum not more than one hundred dollars, nor less than thirty dollars, to be recovered in any court of record having competent jurisdiction. And every person, who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons not licensed, as above, to purchase the same, shall forfeit the

Horses not to be chased of Indi without license.

value of such horse: one half for the benefit of the informant, the other half for the use of the United States, to be recovered, as aforesaid.

Forfeiture by the persons granting license trading with Indians.

SEC. 7. *And be it further enacted,* That no agent, superintendent, or other person authorized to grant a license to trade, or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horses, to or from any Indian; and that any person, offending herein, shall forfeit one thousand dollars, and be imprisoned, at the discretion of the court, before which the conviction shall be had, not exceeding twelve months.

Purchases of their lands invalid unless made pursuant to the Constitution.

SEC. 8. *And be it further enacted,* That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed, *Provided nevertheless,* That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty.

Proviso.

President to furnish friendly Indian tribes, with domestic animals, etc.

SEC. 9. *And be it further enacted,* That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall and may be lawful for the President of the United States, to cause

them to be furnished with useful domestic animals, and implements of husbandry, and also to furnish them with goods or money, in such proportions, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think proper: *Provided*, That the whole amount of such presents, and allowance to such agents, shall not exceed twenty thousand dollars per annum.

to what amount in

Before what

crimes against this may be tried.

SEC. 10. *And be it further enacted,* That the superior courts of each of the said territorial districts, and the circuit courts, and other courts of the United States of similar jurisdiction in criminal causes in each district of the United States, into which any offender against this act shall be first brought, or in which he shall be apprehended, shall have, and are hereby invested with full power and authority, to hear and determine all crimes, offences and misdemeanors against this act; such courts proceeding therein, in the same manner, as if such crimes, offences and misdemeanors had been committed within the bounds of their respective districts: And in all cases, where the punishment shall not be death, the county courts of quarter sessions in the said territorial districts, and the district courts of the United States, in their respective districts, shall have, and are hereby invested with like power to hear and determine the same.

President of U. S. territorial governors to proceed on p made of crimes ag this act.

SEC. 11. *And be it further enacted,* That it shall and may be lawful for the President of the United States,and for the governors of such territorial districts, respectively, on proof to them made, that any citizen or citzens of the United States, or of the said districts, or either of them, have been guilty of any of the said crimes, offences or misdemeanors, within any town, settlement or territory, belonging to any nation or tribe of Indians, to cause such person or persons to be apprehended, and brought into either of the United States, or of the said districts, and to be proceeded against in due course of law. And in all

cases, where the punishment shall be death, it shall be lawful for the governor of the district, into which the offender may be first brought, or in which he may be apprehended, to issue a commission of oyer and terminer to the superior judges of the district, who shall have full power and authority to hear and determine all such capital cases, in the same manner, as the superior courts of such districts have, in their ordinary sessions: And when the offender shall be brought into, or shall be apprehended in any of the United States, except Kentucky, it shall be lawful for the President of the United States, to issue a like commission to any two judges of the supreme court of the United States, and the judge of the district, in which the offender may have been apprehended or first brought; which judges, or any two of them, shall have the same jurisdiction in such capital cases, as the circuit court of such district, and shall proceed to trial and judgment, in the same manner, as such circuit court might or could do.

Disposition of fines and forfeitures under this act.

SEC. 12. *And be it further enacted,* That all fines and forfeitures, which shall accrue under this act, shall be, one half to the use of the informant, and the other half, to the use of the United States, except where the prosecution shall be first instituted on behalf of the United States, in which case, the whole shall be to their use.

Construction of this act defined.

SEC. 13. *And be it further enacted,* That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the jurisdiction of any of the individual states.

Acts within the purview of this act repealed.

SEC. 14. *And be it further enacted,* That all and every other act and acts coming within the purview of this act, shall be and are hereby repealed.

Limitation of this act.

SEC. 15. *And be it further enacted,* That this act shall be in force, for the term of two years, and from thence to the end of the then next session of Congress, and no longer.

APPROVED, MARCH 1, 1793.